STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.	:	DETERMINATION
	:	DTA NOS. 821016
for Redetermination of Deficiencies or for Refund of Corporation Tax under Article 9 of the Tax Law for the Year 1999.	:	AND 821017

Petitioner, Consolidated Edison Company of New York, Inc., filed petitions for redetermination of deficiencies or for refund of corporation tax under Article 9 of the Tax Law for the year 1999.

Petitioner, by its representatives, Alston & Bird, LLP (Richard C. Kariss, Esq., of counsel) and Stephen Ianello, Esq., and the Division of Taxation, by Daniel Smirlock, Esq. (Kathleen D. O'Connell, Esq., of counsel), waived a hearing and agreed to submit the matter for a determination based on documents and briefs to be submitted by February 1, 2008, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation correctly concluded that a portion of the dividends paid by petitioner were taxable pursuant to Tax Law § 186.

II. Whether the penalty imposed pursuant to Tax Law § 1085(k) for substantial understatement of liability should be abated.

III. Whether petitioner has satisfied its burden of proof of establishing that it properly included the original cost of retired assets to offset the gain on the sale of the generation assets for purposes of Tax Law § 186-a.

FINDINGS OF FACT

1. Petitioner, Consolidated Edison Company of New York, Inc. (Con Edison), is a regulated utility that was incorporated in New York State in 1884. It maintains its principal office in New York City.

2. Con Edison engaged in the business of furnishing electricity, gas and steam to the general public in New York City and Westchester County, New York.

3. Based on hearings that began in August of 1994, the New York State Public Service Commission (PSC) determined that the New York State electric utility industry should be fundamentally restructured to encourage competition and thus directed the existing electric utilities, including Con Edison, to file restructuring plans that addressed retail access, divestiture and corporate reorganization.

4. Petitioner filed a report with the Federal Regulatory Commission (FERC), dated December 31, 1994, which showed the following:

Plant	Date Constructed	Last Unit Installed
Arthur Kill steam plant	1902	1962
Astoria steam plant	1953	1962
Ravenswood	1963	1965
Astoria gas turbine plant	1967	1970

There is no reference in the FERC report to a coal-fired plant, nor does the report contain any reference to coal as a primary or alternative fuel.

5. Ultimately, petitioner entered into an Agreement and Settlement (Agreement), dated September 19, 1997, with the PSC. The Agreement required that petitioner divest at least 50 percent of its New York City electric generation fossil-fuel capacity by 2002. Also pursuant to the Agreement, Con Edison became a subsidiary of Consolidated Edison, Inc., (CEI), a public utility holding company. In 1997, CEI was incorporated in New York State.

6. Con Edison was required to submit an initial restructuring and divestiture plan to the PSC by October 1, 1996.

7. After the submission of its initial restructuring and divestiture plan, Con Edison filed its final restructuring and divestiture plan with the PSC on February 27, 1998.

8. The PSC formally adopted a restructuring and divestiture plan by issuing an order to Con Edison on August 5, 1998 (Divestiture Order), under which Con Edison was required to divest itself of at least 50 percent of its New York City electric generating fossil-fueled capacity to unaffiliated third parties.

9. The Divestiture Order required that Con Edison sell its electric generating assets in bundles that included the entirety of certain generation facilities rather then selling component or segregated assets. The PSC recognized that the asset bundles to be liquidated by Con Edison would include active and retired assets (i.e., assets that are located at the generating stations but are not in current usage).

10. Con Edison expected that it would distribute some or all of the proceeds from the divestiture of its generation assets to its sole shareholder, the newly-formed holding company,

CEI, so that CEI could restructure and potentially diversify its business after the mandated divestiture and deregulation of the industry.

11. Advisory opinions had been previously issued by the Advisory Opinion Unit of the Division of Taxation (Division) to other public utilities that had undergone PSC-mandated restructuring. The Advisory Opinion Unit determined that distributions from those utility companies of proceeds or assets resulting from mandated restructuring would not be subject to the excess dividends tax.

12. After engaging in preliminary discussions with and offering a draft submission to the officials of the Advisory Opinion Unit, Con Edison formally submitted a petition for an advisory opinion on September 29, 1998. Through the petition, Con Edison requested that the Advisory Opinion Unit make binding determinations regarding whether the proceeds from the PSC-mandated sale of electric generation assets were subject to the gross earnings tax and whether the distribution of those proceeds to CEI would be subject to the excess dividends tax. Petitioner asked two specific questions:

(1) Is any portion of the value of the consideration received by Con Edison from the sale of the generating assets, or other property, as mandated by the PSC, considered gross earnings subject to tax under section 186 of the Tax Law?

(2) Is the distribution of the proceeds from the sale of the generating assets or other property from Con Edison to CEI, as mandated by the PSC, considered a dividend subject to the tax on excess dividends under section 186 of the Tax Law?

13. Several months before the PSC-mandated sales were executed, the Advisory Opinion Unit responded to the petition by issuing an advisory opinion, TSB-A-99(1)C, on January 22,

1999. The Advisory Opinion set forth the following determination with respect to the gross earnings tax:

> The sale of the generating assets and other property representing the other potential generating sites, including Astoria, Hellgate, Kent Avenue and Sherman Creek, pursuant to the auction process is part of a series of transactions being entered into by Petitioner as mandated by the PSC pursuant to the Competitive Opportunities Proceeding and the PSC's policy objectives set forth in the Generic Order (Opinion No. 96-12), and implemented under Petitioner's Order dated September 19, 1997 and confirmed by the PSC in Opinion No. 97-16, issued November 3, 1997, and in accordance with the Divestiture Plan, Order issued and effective July 21, 1998, modified by Order issued and effective August 5, 1998, and confirmed by the full PSC by Confirming Order, issued and effective August 19, 1998. Through this series of transactions, Petitioner is to divest itself of all of its in-city electric generating fossil-fueled capacity to third parties and excess property that is available for the purpose of constructing new generating facilities, its two-third interest in the Bowline Point Generating Station and its 40 percent share of the Roseton Generating Station via auction. Like Con Ed, supra, and Central Hudson, supra, Petitioner does not employ its capital within the meaning of section 186 of the Tax Law for the purpose of being forced to restructure its organization and auction its assets. Therefore, the amounts received by Petitioner for these assets as a result of the auction process are not receipts from the employment of capital, and do not constitute "gross earnings". Accordingly, the amounts received from the divestiture of these generating assets and potential generating sites pursuant to the Order are not taxable under the gross earnings tax imposed by section 186 of the Tax Law.

14. The Advisory Opinion made the following determination with respect to the excess dividends tax:

> The distribution of the proceeds from the sale of the generating assets and other property representing the other potential generating sites, including Astoria, Hellgate, Kent Avenue and Sherman Creek, from Petitioner [Con Edison] to CEI is part of a series of transactions being entered into by Petitioner as mandated by the PSC pursuant to the Competitive Opportunities Proceeding and the PSC's policy objectives set forth in the Generic Order (Opinion No. 96-12), and implemented under Petitioner's Order dated September 19, 1997 and confirmed by the PSC in Opinion 97-16, issued November 3, 1997, and in accordance with the Divestiture Plan, Order issued and effective July 21, 1998, modified by Order issued and effective August 5, 1998, and confirmed by the full PSC by Confirming Order, issued and effective August 19, 1998. Through this series of transactions, Petitioner is reorganized into the holding company structure and is divesting itself of its generation assets and other potential generating sites. Such

> distribution of the auction proceeds does not represent a distribution of the profits of Petitioner as contemplated in Adams Electric, supra. [272 N.Y. 77 (1936)] Accordingly, the distribution of the proceeds from the sale, at auction, of the generating assets and other property representing the other potential generating sites, would not be distributions treated as dividends subject to the Excess Dividends Tax under Section 186 of the Tax Law.

15. In compliance with an order of the PSC, Con Edison began auctioning its generation assets. Con Edison identified winning bids through the auction process in January 1999 and subsequently executed sales agreements with respect to three "bundles" of generation assets, including Astoria, Ravenswood and Arthur Kill generating stations and approximately 84 gas turbines located in Brooklyn and Queens.

16. The Arthur Kill bundle included the Arthur Kill Generating Station and the Astoria Gas Turbine site. The station consisted of two generating units designed to burn oil or gas and a black start gas turbine. At the time of the sale, Arthur Kill unit 1 had been retired and removed from service. The primary fuel of the Arthur Kill Station was natural gas, with No. 8 fuel oil used as a backup. The Arthur Kill steam plant was originally constructed in 1902, and its last unit was installed in 1962. Arthur Kill's gas turbine plant was constructed in 1970, and its last unit was installed in the same year.

17. The Ravenswood bundle consisted of the Ravenswood Generating Station and the Ravenswood Gas Turbine site. It contained three gas and oil-fired steam generating units in addition to a black start gas turbine. All of the units in this bundle burned natural gas as the primary fuel, with the capacity to burn No. 6 Fuel Oil, No. 2 Fuel Oil or kerosene as alternative fuels. Ravenswood's gas turbine plant was constructed in 1967, and its last unit was installed in 1970.

18. The Astoria bundle included the Astoria Generating Station and the Gowanus and Narrows Gas Turbine sites. The generating units contained in the Astoria bundle burned either natural gas or No. 2 Fuel Oil as a primary fuel, with kerosene as an alternative fuel. The Astoria steam plant was constructed in 1953, and its last unit was installed in 1962. Astoria's gas turbine plant was constructed in 1967, and its last unit was installed in 1971.

19. The three bundles were sold at an auction which realized proceeds as follows: Arthur Kill bundle - $518,122,017.00, Ravenswood bundle - $623,718,627.00 and Astoria bundle - $577,227,445.00.

20. Con Edison divested its interest in the Bowline Point Generating Station located in West Haverstraw, New York, which it co-owned with Orange and Rockland Utilities, Inc. (O & R). The sale of the assets co-owned with O & R was similarly mandated by the PSC, and Con Edison agreed to be bound by O & R's Divestiture Plan.

21. One of the assets, unit 2 at the Astoria generating station, was placed back into service by the purchaser of this asset.

22. The board of directors of Con Edison conducted a meeting and made certain determinations regarding how much it intended for Con Edison to distribute to CEI. Con Edison's board of trustees authorized quarterly dividends for the third and fourth quarters of 1999. The dividend rate for common stock increased by $.005 per share in each year from 1997 to 1999, while the rate for preferred stock was not changed. In addition, the board authorized a "special dividend to CEI of the generation station proceeds." The amount of the special dividend was not to exceed $1.2 million.

23. The regular dividend rates for the third and fourth quarters of 1999 were the same as the rates for the first and second quarters of 1999. According to petitioner's Securities and

Exchange Commission filing, "[c]ommon stock dividends included the dividend to CEI of generation divestiture proceeds of $850 million." It follows that the special dividend issued in the third quarter of 1999 was for $850 million.

24. In a letter dated October 20, 2000, the Division advised petitioner that it would be conducting an audit of its New York State franchise tax reports filed for the periods 1997 through 1999 under Articles 9 and 9-A of the Tax Law. While the audit was in process, petitioner filed a claim for refund, dated August 6, 2001, for the year 1999. The claim sought a refund of $6,839,015.00 based on a "revised gain on sale of property computation." In a letter dated November 30, 2001, the Division requested documentation to support the claim for a refund. The request for substantiation was repeated without success on a number of occasions.

25. In order to compute its gross income tax liability for the year 1999 on its originally filed return, Con Edison reduced the sales proceeds of $1,784,959,733.00 from the PSC-mandated sale of the generation assets by an original cost of $1,587,092,000.00 and selling expenses of $20,000,000.00. Therefore, Con Edison reported profits from the sale of property of $177,867,733.00 on its 1999 utility services gross income tax return and reported a gross income tax liability, based upon these profits, of $6,839,015.00. On the refund claim, Con Edison concluded that it had erroneously excluded the cost of certain retired assets that it sold pursuant to the PSC Divestiture Order.

26. On July 7, 2003, the Division received a response to its ninth request for documentation supporting the refund claim. In its letter, petitioner stated that the requested Final Settlement of Proceeds from the Sale of Generating Assets "is not relevant to the determination of gain for purposes of computing gain under Tax Law section 186-a" because the final Settlement of Proceeds from the Sale of Generating Assets is a net number and not a gross

number as required by section 186-a. The response further took the position that the requested information packet provided to the bidders and the Offering Memorandum submitted to the PSC are "not relevant." In response to the Division's request for "detail of the liabilities assumed by the buyers of the divested assets," petitioner replied that "the purchasers did not assume any mortgages or other debts of Con Edison as part of the plant sale . . . " and "Con Edison retained all environmental liabilities that occurred prior to the closing as well as all tax liabilities, wages, [sic] personal injury claims which occurred up to closing." Petitioner also noted that "[a]ssumed liabilities and phantom income is a net income concept and not applied to the gross receipts tax."

27. The Division issued a Consent to Field Audit Adjustment (Consent), dated January 9, 2004, asserting that additional tax was due for the years 1997 through 1999. The Consent explained that the field audit resulted in an increase in the corporation's tax liability of $18,895,946.00 (consisting of tax of $13,383,094 plus penalty and interest) pursuant to Tax Law § 186 and an increase of $33,026.00 (consisting of tax of $22,886.00 plus interest) pursuant to Tax Law § 186-a. The Consent and attached schedules were premised upon the Division's disallowance of petitioner's exclusion of its third and fourth quarter dividends from tax.

28. On March 8, 2004, the Division issued a Notice of Deficiency (Assessment L-023553919-2) asserting that tax was due in the amount of $13,383,094.00 plus interest in the amount of $4,415,344.90 and penalty in the amount of $1,224,783.00 less payments or credits in the amount of $136,414.00 for a balance due of $18,886,807.90. The notice was premised upon the same finding as the Consent.

29. On or about March 29, 2004, petitioner remitted a check in the amount of $18,886,807.90 based upon the amount of tax, penalty and interest asserted in the notice.

30. On or about May 26, 2004, petitioner filed a request for a conciliation conference protesting the Notice of Deficiency. The conference was conducted on April 6, 2005. A Conciliation Order was issued on December 2, 2005 sustaining the Notice of Deficiency.

31. Petitioner also filed a request for a conciliation conference regarding its claim for a refund. A conference was held on April 6, 2005 and in a Conciliation Order dated December 2, 2005, petitioners claim for refund was denied.

32. On July 14, 2004, while the matter was pending before the Bureau of Conciliation and Mediation Services, the Division requested documents from petitioner regarding the refund claim and, in response, petitioner stated that it "had been advised by counsel that since the matter is now in litigation not to respond to any further inquiries on this issue."

33. Petitions were filed challenging the Notice of Deficiency and the denial of the refund. After filing its answers, the Division again sought substantiation underlying the refund claim. When the records were not forthcoming, the Division requested that the Division of Tax Appeals issue a subpoena requiring the production of the purchase price allocations and any appraisals, valuations, summaries, studies or other documents relating to the value of the retired in place assets. Petitioner declined to provide the documents on the basis that the documents were not relevant.

34. The Division of Tax Appeals issued the requested subpoena, returnable on May 1, 2007, the date of the scheduled hearing on the petitions in this matter. Petitioner appeared at the hearing without any of the subpoenaed documents stating that "we have no responsive documents to the subpoena to submit and we have done due diligence and have not found any documents that are responsive to the subpoena that are in Con Edison's possession."

35. The minutes of petitioner's board of trustees, dated January 26, 1999, states "as part of the sales process, the Company provided a full day of management presentations on such topics as environmental issues, personnel, fuel, market power, transmission and the Independent System Operator (ISO), site separation and repowering [sic]; arranged plant presentations and tours and established two data rooms at Irving Place." Petitioner's headquarters were located at 4 Irving Place.

36. Petitioner's pretax valuation of the auctioned assets was performed by Morgan Stanley. Morgan Stanley gave "a fairness opinion on the auction process and the prices." The Offering Memorandum, which was prepared by Morgan Stanley and which petitioner was unwilling to provide to the Division, is contained in the corrected record on appeal to the Court of Appeals in ***Consolidated Edison Company of New York, Inc. v. The City of New York***. The record on appeal also includes appraisals for petitioner's Fresh Kills Station and the Arthur Kill Generation Station.

37. In accordance with New York State Administrative Procedure Act § 307(1), many of petitioner's proposed findings of fact related to the assessment have been accepted, in whole or in part, and incorporated herein. It is noted that proposed findings of fact 6, 9, 10, 31, 33, 36, 41, 42, 44, 45, 47, and 48 have been rejected as unnecessary for the determination or not clearly supported by the record at the location referenced. Proposed findings of fact 12, 14, and 15, 19 through 25, 38, 39, 46 and 49 are rejected for being in the nature of argument or a conclusion of law. It is noted that there is no provision in the Tax Law for proposed conclusions of law.

38. Many of petitioner's proposed findings of fact related to the denial of the refund have also been accepted and incorporated herein. It is noted that proposed findings of fact 16, 22, 23 and 24 were rejected because they were in the nature of legal argument or a conclusion of law.

Proposed findings of fact 17, 18, 19 and 31 were not supported in the record at the pages cited. Proposed finding of fact 26 and 33 were not relevant. As stated above, there is no provision in the Tax Law for proposed conclusions of law.

CONCLUSIONS OF LAW

A. Petitioner first argues that the Division's assertion that additional tax is due is erroneous. According to petitioner, the Division is bound by the determination that the PSC-mandated asset sale proceeds are not subject to the gross earnings tax and that the distribution of any of those proceeds is not subject to excess dividends tax. In response, the Division argues that petitioner has not satisfied its burden of proving that its interpretation of the Tax Law and the Division's advisory opinion was the only plausible construction.

B. Tax Law § 171 and 20 NYCRR 2376.1 provide for the issuance of advisory opinions of the Commissioner of Taxation and Finance. An advisory opinion is issued at the request of a person who is or may be subject to liability under the Tax Law and is binding upon the Commissioner with respect to that person only (20 NYCRR 2376.1[a]; 20 NYCRR 2376.4).

C. In order to address the arguments raised by petitioner, it is necessary to place the issue in the context of the law as it existed at the time of the advisory opinion. Former section 186 of the Tax Law imposed a franchise tax upon "every corporation formed for or principally engaged in the business of supplying gas or electricity . . . for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this state." The tax was imposed at a rate of three-quarters of one percent on the taxpayer's gross earnings from all sources within New York State, and at four and one-half percent on the amount of dividends paid during each year in excess of four percent of the actual amount of paid-in capital employed in New York State by the taxpayer (Tax Law former § 186[1]). The term "gross earnings" was

defined as "all receipts from the employment of capital without any deduction." (***Id***.) Petitioner has not disputed that it was subject to the taxes imposed on its gross earnings from New York sources or on dividends paid during the year.

D. Petitioner requested an advisory opinion which asked two specific questions as noted in Finding of Fact 12. On the first issue, the Advisory Opinion held that petitioner was not employing capital within the meaning of Tax Law § 186 when it was forced to restructure its organization and auction its assets. As a result, the amounts received by Con Edison as a result of the auction process were not receipts from the employment of capital and did not constitute "gross earnings." Accordingly, the amounts received from the divestiture of the generating assets were not taxable gross earnings pursuant to Tax Law § 186.

E. In accordance with the reasoning in the Advisory Opinion, the decisive issue is whether all of the amounts distributed to CEI were proceeds from the mandated divestiture sales. The record supports the Division's position that they were not. The board of directors of Con Edison conducted a meeting and made certain determinations regarding how much it intended for Con Edison to distribute to CEI. Con Edison's board of trustees authorized quarterly dividends for the third and fourth quarters of 1999. The dividend rate for common stock increased by $.005 per share in each year from 1997 to 1999, while the rate for preferred stock was not changed. In addition, the board authorized a "special dividend to CEI of the generation station proceeds." The amount of the special dividend was not to exceed $1.2 million.

F. Petitioner's regular third and fourth quarter dividends arose from the distribution of profits earned in the ordinary course of business. Petitioner excluded these dividends as well as the $850 million special dividend. The Division correctly concluded that it was improper for

petitioner to exclude the third and fourth quarter dividends which arose from profits earned in the ordinary course of business from tax.

G. Petitioner argues that the penalty imposed for a substantial understatement of tax should be abated because it acted in good faith and with reasonable cause with respect to the computation of the excess dividends tax. Section 1085(k) of the Tax Law authorizes a waiver of the penalty upon a showing that there was reasonable cause for the understatement and that the taxpayer acted in good faith. The record presented here does not show reasonable cause for the understatement. While it is correct that petitioner requested an advisory opinion, it then adopted an aggressive reporting position in interpreting that advisory opinion in an attempt to transform taxable regular dividends from profits into exempt proceeds from a divestiture. This practice does not show that petitioner acted in good faith.

H. On the second issue, the Advisory Opinion concluded that the "distribution of the auction proceeds does not represent a distribution of the profits of Petitioner as contemplated in Adams Electric, supra. Accordingly, the distribution of the proceeds from the sale, at auction, of the generating assets and other property representing the other potential generating sites, would not be distributions treated as dividends subject to the Excess Dividends Tax under section 186 of the Tax Law." (TSB-A-99[1]C).

I. In order to compute its gross income tax liability for the year 1999 on its originally filed return, Con Edison reduced the sales proceeds by $1,784,959,733.00 from the PSC-mandated sale of the generation assets by an original cost of $1,587,092,000.00 and selling expenses of $20,000,000.00. Therefore, Con Edison reported profits from the sale of property of $177,867,733.00 on its 1999 utility services gross income tax return and reported a gross income tax liability, based upon these profits, of $6,839,015.00. Thereafter, Con Edison filed a refund

claim after concluding that it had erroneously excluded the original cost of certain retired assets that it sold pursuant to the PSC Divestiture Order.

J. In support of its refund claim, petitioner argues that under Tax Law former § 186-a(2)(c)(5), the gross income tax is imposed on gross income including the "profits" from the sale of assets. To determine profits for that purpose, it is maintained that gross proceeds from the sale of assets are reduced by the original cost of the assets and the related selling expenses. Citing a series of Advisory Opinions, petitioner contends that taxpayers and the Division are required to aggregate generation asset sales which were executed pursuant to PSC-mandated divestiture transactions and treat those sales as a single transaction.

Petitioner's argument continues that in order to compute aggregated profit from PSC-mandated sales, all proceeds are combined and then the taxpayer deducts the combined selling expenses and the combined original cost of all assets sold related to the PSC-mandated sales. It is submitted that under this methodology, gross proceeds related to the sale of individual assets are irrelevant. According to petitioner, the only amounts that are relevant to the computation of the profit are the total gross proceeds from the asset sales, the original cost of the assets sold and the selling expenses related to the asset sales.

K. In response, the Division contends that petitioner has not satisfied its burden of proving that the retired assets it used to offset the gain on the divestiture sales were generating assets and were actually sold.

L. The record shows that petitioner filed a 1999 New York State Utility Services Tax Return reporting a gain of $177,867,773.00 from the sale of its generating assets. Thereafter, petitioner filed a claim for Credit or Refund of Corporation Tax Paid, dated August 6, 2001, claiming a refund of $6,839,015.00 based on a "revised gain on sale of property computation."

The revised computation included the original cost of assets retired in place and removed from petitioner's books and records.

M. As pointed out by the Division, petitioner claims that property retired from both steam and electric plants were sold as part of the divestiture sales. The terms "electric plant" and "steam plant" include "all real estate, fixtures, and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing" of electricity or steam. (Public Service Law §§ 2.02, 2.21). A unit of property is retired from an electric plant when it is "removed, sold, abandoned, destroyed or otherwise ceases to be used or useful in electric service." (16 NYCRR 182.2[b][2].) In the context of a steam plant, "[p]roperty retired . . . means property which has been removed, sold, abandoned, destroyed, or for which any cause has ceased to be used and useful in the steam service of the public." (16 NYCRR 460.1[30].) Thus, retired property of an electric plant or a steam plant is property which has ceased to be used or useful in the type of service for which it was intended.

N. The only instance in the record where retired equipment is identified with specificity is in the Asset Purchase and Sale Agreement for the Astoria Bundle. Units 1 and 2 of the Astoria Generating Station are located on the schedule labeled Buyer Personal Property Located on Buyer Real Estate. With respect to each of the units, the schedule notes that "[h]oles have been cut in the Boiler Drum and the Main Steam Lead; the Generator Electric Leads have been severed."

O. Tax Law § 1096(b) provides that for the purpose of ascertaining the correctness of any return the Division "shall have the power to examine or to cause to be examined, by any agent or representative designated by it for that purpose, any books, papers, records or memoranda bearing upon the matters required to be included in the return . . . ." The record in this case

establishes that the Division made repeated requests for records which would enable it to ascertain whether the retired assets used to offset petitioner's gain were actually sold. In response, petitioner initially declined to provide the information requested. Later, following the issuance of a subpoena for the same materials, petitioner stated at the hearing in this matter that it could not find any documents that were responsive to the subpoena. The failure to provide the information requested to substantiate the claim for refund compels a conclusion that petitioner has not sustained its burden of proof of establishing that it is entitled to the refund claimed (Tax Law § 1096(b); 20 NYCRR 39.1[a][2]).

P. The petitions of Consolidated Edison Company of New York, Inc., are denied, the Notice of Deficiency issued May 26, 2004 is sustained and the Division's denial of the refund claim is sustained.

DATED: Troy, New York
July 31, 2008

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE